

ARTICLE 5. PRIVILEGES

Rule 501. Privilege in General.

The common law—as interpreted by Arizona courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:

- the United States or Arizona Constitution;
- an applicable statute; or
- rules prescribed by the Supreme Court.

Comment to 2012 Amendment

The language of Rule 501 has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Cases

Requirements for a Privilege.

501.050 To be privileged, a communication must meet four criteria: (1) it originates in a confidence that the person making the communication believes will not be disclosed; (2) confidentiality is essential to the full maintenance of the relationship of the parties; (3) the relationship is one that the community believes should be fostered; and (4) the injury to the relationship that would occur from disclosure would be greater than the benefit gained by the aid given to the litigation.

State ex rel. Thomas v. Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶¶ 29–32 (Ct. App. 2006) (notary and city clerk backdated financial disclosure statements that city council members did not timely file; communications were between city attorney and members of city council and city clerk about these events, made both in private and during executive sessions of the city council; court concluded that individuals in question thought they were being represented by city attorney and that he should keep communications confidential).

State ex rel. Thomas v. Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶ 25 (Ct. App. 2006) (court noted that A.R.S. § 38–431.03(B)(4) provides that discussions made in executive session are confidential (except for investigation of violation of open-meeting law), thus persons making communications in executive session would reasonably believe that those communications would not be disclosed).

Purpose of a Privilege.

501.080 If the party that would possess the privilege believes a privileged relationship exists and the statement will not be disclosed, it does not matter that, unbeknownst to that party, the situation of the person hearing the statement is such that a privileged relationship could not exist.

Barnes v. Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was not licensed as a counselor and thus privilege would not apply to him, court held his lack of a license did not immunize defendant from a claim of counseling malpractice based on his disclosure of confidential communications), *vac'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

Right to Information Protected by a Privilege.

501.110 Because the public has the right to every person's testimony, and because constitutional, statutory, and common law privileges contravene the public's right, such privileges are strictly construed and should be weighed against other policy considerations when determining whether to allow a witness to claim a privilege.

Arizona Indep. Redist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶ 14 (Ct. App. 2003) (court construed legislative privilege).

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 9-14 (Ct. App. 2002) (defendant was charged with DUI and child abuse as result of having children in car; A.R.S. § 13-3620(G) provides that all privileges, except the attorney-client privilege, are abrogated in any proceeding involving the abuse of a child; defendant contended § 13-3623(F)(1) limited child abuse to instances when child suffered actual injury; court rejected defendant's contention, noting that privileges are interpreted narrowly).

State v. Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶ 5 (Ct. App. 2001) (court made this statement, but then applied privilege to preclude admission of testimony of doctor who saw defendant for independent medical examination).

Attorney-Client.

501.150 The attorney-client privilege protects communications between a client and an attorney with whom the client has consulted for the purpose of bona fide legal advice or representation, and is intended to encourage the client in need of legal advice to tell the attorney all the information necessary so the attorney may provide effective legal representation.

Samaritan Found. v. Goodfarb, 176 Ariz. 497, 501, 862 P.2d 870, 874 (1993) (court stated general principles about attorney-client privilege).

501.155 The attorney-client privilege applies to communications between an attorney for a corporation, governmental entity, partnership, business association, or other similar entity or an employer, and any employee, agent, or member of the entity or employer, and protects communications about acts or omissions of or information from the employee, agent or member if the communication is either (1) for the purpose of providing legal advice to the entity, employer, employee, agent, or member, or (2) for the purpose of obtaining information in order to provide legal advice to the entity, employer, employee, agent, or member, but does not cover disclosure of facts.

* *Salvation Army v. Bryson*, 229 Ariz. 204, 273 P.3d 656, ¶¶ 14-24 (Ct. App. 2012) (court held trial court abused discretion in ordering corporation to disclose summaries of interviews conducted by investigator employed by corporation's attorney with four of corporation's employees; on remand, trial court was to determine whether six of corporation's volunteers could be considered "agents" or "members" and thus whether their interviews would be privileged).

501.157 The attorney-client privilege protects communications between a client and an attorney with whom the client has consulted for the purpose of bona fide legal advice or representation, and contains no exception for communication between a government attorney and a government official that could be used in a criminal prosecution against the government official.

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State ex rel. Thomas v. Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶¶ 19–28 (Ct. App. 2006) (notary and city clerk backdated financial disclosure statements that city council members did not timely file; communications were between city attorney and members of city council and city clerk about these events, made both in private and during executive sessions of the city council; court rejected state’s contention that attorney-client privilege did not apply).

501.160 An attorney-client privilege does not exist when the client retains the attorney for the purpose of promoting intended or continuing criminal or fraudulent activity.

Kline v. Kline, 221 Ariz. 564, 212 P.3d 902, ¶¶ 34–37 (Ct. App. 2009) (trial court concluded husband was committing fraud against wife, and so ordered husband’s attorney to testify).

501.165 For the “crime-fraud” exception to the attorney-client privilege to apply, there must be a prima facie showing that a communication with an attorney was used to perpetuate a crime or fraud.

Kline v. Kline, 221 Ariz. 564, 212 P.3d 902, ¶¶ 34–37 (Ct. App. 2009) (trial court concluded husband was committing fraud against wife, and so ordered husband’s attorney to testify; trial court did not find crime-fraud exception applied merely because wife claimed there was fraud, rather trial court considered facts in wife’s complaint, which court held were well-pled pursuant to rules of civil procedure; court held trial court did not abuse discretion in applying crime-fraud exception).

501.175 The common interest doctrine applies if two or more clients have a common interest in a litigated or nonlitigated matter and are represented by separate lawyers, and provides that, if information is protected by the attorney-client privilege with that client’s lawyer, the client may share that information with any another client with a common interest, and the attorney-client privilege will still protect that information, thus the common interest doctrine does not create a privilege, but is an exception to the rule that disclosure to a third person waives the privilege.

Arizona Indep. Redist. Comm’n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 35–41 (Ct. App. 2003) (Arizona Independent Redistricting Commission hired National Demographics Corporation as lead consultant in redistricting process; court held that, while IRC and NDC may have had common goal of drafting legally viable redistricting plan, they did not have common legal interest, thus common interest doctrine did not apply).

501.200 Although there is no attorney-client privilege between a person and a lay representative, including a “jailhouse lawyer,” if the Arizona Department of Corrections allows an inmate to obtain the services of an inmate representative for prison disciplinary proceedings, the Due Process Clause of the Arizona Constitution protects the communications and information acquired in the course of that prison representation, but if the Arizona Department of Corrections does not induce an inmate to use such representation, the communications are not so protected.

State v. Foster, 199 Ariz. 39, 13 P.3d 781, ¶¶ 9–16 (Ct. App. 2000) (defendant was suspect in murder investigation, and his parole officer returned him to AzDOC; defendant contacted inmate who was “legal representative” and asked for assistance in preparing for parole violation hearing; after defendant confessed to “legal representative” that he killed victim, “legal representative” then told police of confession; because (1) state merely regulated those who could act as legal representatives, (2) state only advised defendant he could be represented by attorney at own expense and did not advise defendant he was entitled to inmate representation, and (3)

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inmate would not have been allowed to represent or advise defendant at parole violation hearing, there was no quasi-attorney-client relationship, and allowing other inmate to testify against defendant did not violate due process).

501.215 By making a claim of ineffective assistance of counsel, the defendant waives the attorney-client privilege.

State v. Cuffle, 171 Ariz. 49, 51-53, 828 P.2d 773, 775-777 (1992) (although defendant did not make direct claim that his attorney provided ineffective assistance of counsel, by claiming he did not know nature of charges and thus guilty plea was involuntary, defendant implicitly, if not explicitly, questioned competency of his attorney, and therefore waived attorney-client privilege to extent necessary to resolve that question).

State v. Moreno, 128 Ariz. 257, 260, 625 P.2d 320, 323 (1981) (defendant filed motion for new trial claiming trial counsel provided ineffective assistance of counsel by failing to investigate potential defenses, failing to consult with defendant, and failing to introduce evidence to support instruction on lesser degree of murder, by claiming his attorney provided ineffective assistance of counsel, defendant waived attorney-client privilege to extent necessary to resolve that question).

State v. Paris-Sheldon, 214 Ariz. 500, 154 P.3d 1046, ¶ 15 (Ct. App. 2007) (defendant asked trial court to appoint new counsel based on what she contended her attorney had said and had failed to do; trial court held informal hearing and asked attorney about what he had said to defendant; defendant contended trial court's questioning of attorney violated attorney-client privilege; court held that, when defendant made claim based on what she claimed attorney had said, trial court was required to question attorney about statements, thus to that extent, defendant had waived attorney-client privilege).

Arizona Medical Board.

501.250 During the course of any investigation, if the Arizona Medical Board determines that a criminal violation may have occurred involving the delivery of health care, the Board shall make the evidence of violations available to the appropriate criminal justice agency for its consideration.

State ex rel. Thomas v. Ditsworth (Patel), 216 Ariz. 339, 166 P.3d 130, ¶¶ 8-18 (Ct. App. 2007) (patient alleged that, during treatment for yeast infection and annual pap smear, doctor inserted un-gloved finger into her rectum and vagina, fondled her breasts, and pulled her into his lap; Arizona Medical Board investigated and reached consent agreement with doctor that required him to undergo treatment at Sexual Recovery Institute; after grand jury indicted doctor and trial court granted motion for new determination of probable cause, trial court granted doctor's motion to preclude statements made in response to Board's investigation and statements in SRI report; court held statements indicating that criminal violation may have occurred were not privileged, and vacated trial court's order precluding statements).

501.260 A.R.S. § 32-1451(A) abrogated the common law, which provided an absolute privilege for reports involving professional misconduct in quasi-judicial proceedings, and replaced it with a privilege for one who provides information in good faith.

Advanced Cardiac Spec. v. Tri-City Cardio. Consul., 222 Ariz. 383, 214 P.3d 1024, ¶¶ 7-11 (Ct. App. 2009) (court concluded defendant did not abuse statutory privilege and thus affirmed trial court's grant of summary judgment to defendant).

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Cleric/Priest-Penitent.

501.271 The cleric/priest-penitent privilege exists when **three** factors exist, the **first** of which is the person who received the confession was a cleric or priest.

State v. Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 7–9 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; record showed Church bestowed title of “Bishop,” and that Bishop maintained office at local church, managed ecclesiastical and financial issues, handled repentance process and confessions, and oversaw sacrament meetings, other Sunday meetings, and youth programs; Bishop therefore qualified as cleric or priest).

501.272 The cleric/priest-penitent privilege exists when **three** factors exist, the **second** of which is the cleric or priest was acting in a professional capacity as a cleric or priest.

State v. Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 7, 10–11 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; record showed defendant made confession to Bishop in church office, Bishop received confessions in his “role as the Bishop,” and confession was made in furtherance of repentance process as recognized by Church; defendant therefore made confession while Bishop was serving in professional capacity).

Barnes v. Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was a pastor, he treated plaintiff as a psychological therapist, so cleric/priest-penitent privilege did not apply), *vac’d in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

501.273 The cleric/priest-penitent privilege exists when **three** factors exist, the **third** of which is the confession was made in the course of discipline enjoined by the religious organization to which the cleric or priest belongs, which focuses on the duties and obligations of cleric or priest and the rules and obligations of the cleric’s or priest’s faith.

State v. Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 7, 12–13 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; Bishop testified that repentance process is official church doctrine and Bishop’s duties include facilitating repentance process; defendant therefore made confession in the course of discipline enjoined by Church).

501.280 A “clergyman” is not limited only to an ordained clergy; instead, whether a person is a clergyman of a particular organization is determined by that organization’s ecclesiastical rules, customs, and laws.

State v. Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 7–9 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop that defendant admitted to her that he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; record

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showed Church bestowed title of “Bishop,” and that Bishop maintained office at local church, managed ecclesiastical and financial issues, handled repentance process and confessions, and oversaw sacrament meetings, other Sunday meetings, and youth programs; Bishop therefore qualified as cleric or priest).

Waters v. O'Connor, 209 Ariz. 380, 103 P.3d 292, ¶¶ 1–26 (Ct. App. 2004) (defendant was charged with sexual conduct with 16-year-old boy; defendant discussed her relationship in graphic detail with “Minister” D.W., who was volunteer music director at church defendant attended; defendant contended her communications with D.W. were privileged because she believed D.W. was a minister and confided in her as a minister; court concluded that D.W. was not a clergyman in accordance with her church’s ecclesiastical rules, customs, and laws, thus communications were not privileged; court further concluded defendant’s belief that D.W. was a minister was not reasonable).

Confidentiality Statute.

501.290 A.R.S. § 44–2042 provides that the names of complainants and all information or documents obtained by any officer, employee, or agent of the Arizona Corporation Commission obtained in the course of any examination or investigation are confidential unless this information is made a matter of public record; the privilege may also be waived if the Commission designates a consulting expert as a testifying expert, and that waiver will apply to all information relating to the subject matter of that expert’s testimony.

Slade v. Schneider (Arizona Corp. Comm’n), 212 Ariz. 176, 129 P.3d 465, ¶¶ 21–25 (Ct. App. 2006) (in its application for temporary restraining order, Commission included affidavit of accountant and designated accountant as expert witness; court held that Commission waived confidentiality statute when it designated accountant as expert witness, thus accountant’s entire file was discoverable to extent it contained information or material that related to subject matter of accountant’s testimony).

Slade v. Schneider (Arizona Corp. Comm’n), 212 Ariz. 176, 129 P.3d 465, ¶¶ 26–28 (Ct. App. 2006) (in its application for temporary restraining order, Commission included affidavit of investigator; court held that mere inclusion of affidavit did not make investigator a testifying expert, thus inclusion of investigator’s affidavit did not waive work-product immunity).

Slade v. Schneider (Arizona Corp. Comm’n), 212 Ariz. 176, 129 P.3d 465, ¶¶ 29–32 (Ct. App. 2006) (in its application for temporary restraining order, Commission included affidavit of investigator; court held that inclusion of affidavit made a matter of public record all information contained in affidavit; because affidavit stated that investigator had identified “at least 104 Mathon Fund investors,” Commission must disclose names of those investors).

Corporate Litigation.

501.305 In *Samaritan Foundation v. Goodfarb*, the court held the civil attorney-client privilege applied only to employee-initiated communications intended to seek legal advice or to communications concerning the employee’s own conduct for the purpose of assessing legal consequences for the corporation; in response to *Samaritan Foundation v. Goodfarb*, the Arizona Legislature amended the civil attorney-client privilege statute to broaden the privilege for corporations in civil cases; under this amendment, any communications between an attorney and an employee or agent of the corporation, made for the purpose of providing legal advice or obtaining information to provide legal advice, are protected, the critical distinction between the two interpretations being whether

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information was being sought or obtained in connection with a person's own conduct as an employee; this change only affected the privilege in civil cases and not the privilege in criminal cases.

Roman Catholic Diocese v. Superior Ct., 204 Ariz. 225, 62 P.3d 970, ¶¶ 4–11, 17 (Ct. App. 2003) (trial court ordered Roman Catholic Diocese to produce certain documents in grand jury proceedings; court rejected argument that amendment to statute for civil cases should also apply in criminal cases).

501.330 A factual communication from a corporate employee to corporate counsel is within the corporation's privilege only if it concerns the employee's own conduct within the scope of the employee's employment and is made to assist counsel in assessing or responding to the legal consequences of that conduct for the corporate client, but such a factual communication is not within the privilege if the communication is from an employee who, but for the status as an employee, would be a mere witness.

State ex rel. Thomas v. Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶¶ 15–17 (Ct. App. 2006) (communications were between city attorney and members of city council and city clerk, made both in private and during executive sessions of the city council).

501.345 If an expert retained to investigate and produce reports is also listed as a testimonial witness, that waives the work-product protection for the subject of the expert's testimony.

Emergency Care Dyn. v. Superior Ct., 188 Ariz. 32, 932 P.2d 297 (Ct. App. 1997) (plaintiffs hired expert both for consultation and testimony; trial court properly allowed defendants to depose expert and rejected plaintiffs' claim that expert's file contained protected material).

Legislative and Deliberative Process.

501.410 The legislative privilege, which is in the Arizona Constitution, art. 4, pt. 2, sec. 7, is an absolute bar to criminal prosecution or civil liability, and also functions as a testimonial and evidentiary privilege.

Arizona Indep. Redist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 15–24 (Ct. App. 2003) (court held legislative privilege applied to Arizona Independent Redistricting Commission).

501.415 A legislator may invoke the legislative privilege to shield from inquiry the acts of an independent contractor retained by that legislator that would be privileged legislative conduct if personally performed by that legislator.

Arizona Indep. Redist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 25–30 (Ct. App. 2003) (court held that legislative privilege applied to acts of National Demographics Corporation, which had been hired by Arizona Independent Redistricting Commission as lead consultant in redistricting process).

501.420 To the extent the legislative privilege protects against inquiry about a legislative act or communications about that act, the privilege also shields from disclosure documentation reflecting those acts or communications.

Arizona Indep. Redist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 31–32 (Ct. App. 2003) (court held legislative privilege applied to documents exchanged between Arizona Independent Redistricting Commission and National Demographics Corporation).

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Litigation.

501.430 A party to a private litigation is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as part of, a judicial proceeding in which the party participates, if the matter has some relation to the proceeding.

Hall v. Smith, 214 Ariz. 309, 152 P.3d 1192, ¶¶ 7–8 (Ct. App. 2007) (Smith filed wrongful termination suit against CIGNA AZ; after nearly 8 years of litigation, Smith wrote letter to CEO of CIGNA Corporation stating that Hall (executive director of CIGNA AZ) and colleagues were diverting corporate funds to their own use).

501.440 For the litigation privilege to apply to a communication with a non-party to the litigation, the recipient must have had a close or direct relationship to the proceedings.

Hall v. Smith, 214 Ariz. 309, 152 P.3d 1192, ¶¶ 9–21 (Ct. App. 2007) (during wrongful termination litigation against CIGNA AZ, Smith wrote letter to CEO of CIGNA Corporation (CIGNA) stating Hall (executive director of CIGNA AZ) and colleagues were diverting corporate funds to own use; Hall contended litigation privilege did not apply because CIGNA AZ and CIGNA were separate entities; court noted CIGNA was significantly involved in Smith-CIGNA AZ litigation; CIGNA sent several of its employees to investigate Hall's allegations; CIGNA selected attorneys to defend CIGNA AZ; and CIGNA controlled defense of Smith's lawsuit against CIGNA AZ; further, testimony was that, if somebody at CIGNA AZ was doing something wrong, it would have been taken to CIGNA; court concluded CIGNA's relationship was close and direct, and thus privilege applied).

Marital.

501.440 The anti-marital fact privilege applies to those events or communications that are “for or against” the person asserting the privilege, which does not mean “favorable or unfavorable,” it means “on behalf of” a spouse or “on behalf of a party opposing” a spouse.

In re MH 2007–000937, 218 Ariz. 517, 189 P.3d 1090, ¶¶ 6–14 (Ct. App. 2008) (in mental health proceeding for wife, trial court allowed husband to testify about his observations of wife's behavior; court held anti-marital fact privilege applied in court-ordered mental health treatment proceedings, and rejected argument that these proceedings were non-adversarial statutory proceedings and thus husband was not testifying “against” wife).

501.450 The anti-marital fact privilege allows a party-spouse to prevent the other spouse from testifying for or against the party-spouse in a civil or criminal proceeding, and dissolution of the marriage terminates this privilege.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 29–31 (2001) (defendant and ex-wife were divorced; trial court precluded ex-wife from testifying about conversations, but allowed her to testify about things she observed, overheard, or did with defendant; court held that, because defendant and ex-wife were divorced, anti-marital fact privilege did not apply).

In re MH 2007–000937, 218 Ariz. 517, 189 P.3d 1090, ¶¶ 6–14 (Ct. App. 2008) (in mental health proceeding for wife, trial court allowed husband to testify about his observations of wife's behavior; court held anti-marital fact privilege applied in court-ordered mental health treatment proceedings, and rejected argument that these proceedings were non-adversarial statutory proceedings and thus husband was not testifying “against” wife).

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501.460 The marital communication privilege protects confidential communications that the spouses made during the period that they were married, and dissolution of the marriage does not terminate this privilege.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 29–32 (2001) (defendant and ex-wife were divorced; trial court precluded ex-wife from testifying about conversations, but allowed her to testify about things she observed, overheard, or did with defendant; court held that marital communication privilege survived the marriage and thus did apply).

501.470 The marital communication privilege protects communications between husband and wife, it does not extend to non-confidential communications or non-communicative acts, or facts that are not part of the communication, thus the fact that husband and wife are or were married, and the dates and number of communications are not privileged.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 29–33 (2001) (defendant and ex-wife were divorced; trial court precluded ex-wife from testifying about conversations, but allowed her to testify about things she observed, overheard, or did with defendant; court held trial court properly allowed ex-wife to testify that defendant had received certain packages and then burned one package).

501.475 The anti-marital fact privilege and the marital communication privilege do not apply in the following: (1) in an action for divorce or a civil action by one against the other; (2) in a criminal action or proceeding as provided by the criminal code; (3) in an action brought by the husband or wife against another person for the alienation of the affection; and (4) in an action for damages against another person for adultery committed by either husband or wife.

In re MH 2007–000937, 218 Ariz. 517, 189 P.3d 1090, ¶¶ 15–16 (Ct. App. 2008) (in mental health proceeding for wife, trial court allowed husband to testify about his observations of wife's behavior; court held anti-marital fact privilege applied in court-ordered mental health treatment proceedings; court noted that mental health agency was one that filed petition for court-ordered evaluation and rejected argument that, because husband had submitted application for evaluation by screening agency, this was action by husband against wife).

501.480 The anti-marital fact privilege and the marital communication privilege do not apply in the following: (1) in a criminal action or proceeding for a crime committed one spouse against the other, (2) in a criminal action or proceeding against the husband for abandonment, failure to support or provide, or failure or neglect to furnish the necessities of life to the wife and minor children, which includes a proceeding involving the neglect, dependency, abuse, or abandonment of a child.

State v. Mauro, 149 Ariz. 24, 27–28, 716 P.2d 393, 396–97 (1986) (privilege does not apply in proceedings involving the killing of a child from marriage).

State v. Salazar, 146 Ariz. 547, 550, 707 P.2d 951, 954 (Ct. App. 1985) (defendant convicted of manslaughter, endangerment, and DUI; because wife was victim of endangerment charge, trial court properly allowed wife to testify against defendant; court rejected defendant's argument that exception should only apply to crimes involving intentional or knowing conduct and not to reckless conduct).

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Peer Review.

501.525 All proceedings, records, and materials prepared in connection with peer reviews are confidential and are not subject to discovery.

Sun Health Corp. v. Myers (North), 205 Ariz. 315, 70 P.3d 444, ¶¶ 6–15 (Ct. App. 2003) (plaintiff brought wrongful death action against hospital alleging certain doctor negligently performed heart surgery; plaintiffs requested all documents hospital sent to BOMAX about that doctor, and requested hospital admit that one case that peer committee review was that of plaintiff's decedent and that hospital knew of complaints against that doctor; court held that, except for decedent's medical charts and possibly complaints against doctor, requested material was privileged).

Physician-Patient.

501.600 In order for the physician-patient privilege to apply, (1) the patient must not consent to the testimony, (2) the witness must be a physician or surgeon, (3) the information must have been imparted to the physician while treating the patient, and (4) the information must be necessary to enable the physician or surgeon to prescribe or act for the treatment of the patient.

Schoeneweis v. Hamner, 223 Ariz. 169, 221 P.3d 48, ¶¶ 16–19 (Ct. App. 2009) (petitioner sought to prevent disclosure of wife's autopsy report; court held that physician-patient privilege did not apply to autopsy reports).

State v. Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶¶ 6–8 (Ct. App. 2001) (state charged defendant with fraudulent scheme as result of filing claims for workers' compensation benefits; state claimed privilege did not apply because defendant did not see doctor for purpose of treatment, but instead for pecuniary gain; court held privilege applied when person was seeking treatment, even though person had ulterior motive, and held trial court properly precluded state from questioning doctor who saw defendant for an independent medical examination).

501.620 The physician-patient privilege protects communications between doctor and patient; it does not extend to facts that are not part of the communication, thus the fact that a patient has consulted a doctor, the identity of the patient, and the dates and number of visits to the doctor are not privileged.

Carondelet Health Network v. Miller, 221 Ariz. 614, 212 P.3d 952, ¶¶ 4–18 (Ct. App. 2009) (while at hospital, decedent sustained fractured hip; later that morning, decedent's hospital roommate told decedent's wife that decedent had fallen twice that night, and that each time decedent's roommate had notified decedent's nurse; although decedent's wife spoke directly with roommate, she did not obtain roommate's name or contact information; decedent's wife asked trial court to order hospital to disclose roommate's name so she could interview him as witness; court held that, because disclosing roommate's name would not result in disclosing any information about roommate's medical treatment, for hospital to disclose roommate's name would not violate physician-patient privilege).

501.625 If disclosing the name of a patient does not disclose any information about the medical treatment the patient received, then disclosing the patient's name will not violate the physician-patient privilege, but if disclosing the name of a patient does disclose information about the medical treatment the patient received, then disclosing the patient's name will violate the physician-patient privilege.

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Carondelet Health Network v. Miller, 221 Ariz. 614, 212 P.3d 952, ¶¶ 4–18 (Ct. App. 2009) (while at hospital, decedent sustained fractured hip; later that morning, decedent's hospital roommate told decedent's wife that decedent had fallen twice that night, and that each time decedent's roommate had notified decedent's nurse; although decedent's wife spoke directly with roommate, she did not obtain roommate's name or contact information; decedent's wife asked trial court to order hospital to disclose roommate's name so she could interview him as witness; court held that, because disclosing roommate's name would not result in disclosing any information about roommate's medical treatment, for hospital to disclose roommate's name would not violate physician-patient privilege).

Ziegler v. Superior Court, 131 Ariz. 250, 251, 640 P.3d 181, 182 (Ct. App. 1982) (plaintiff requested trial court to disclose medical records of 24 patients who had received pacemakers; trial court ordered hospital to disclose those medical records with names and other identifying information removed; because plaintiff then knew nature of medical treatment that those 24 patients had received, and because disclosing names of each of those individuals would result in plaintiff's knowing what medical treatment each then named individual patient received, court held that disclosing names of each of these patients would violate physician-patient privilege).

501.635 When a plaintiff sues a hospital and certain hospital employees in a medical malpractice case, the patient-physician privilege does not preclude the hospital's counsel from communicating with hospital employees who had treated plaintiff.

Phoenix Child. Hosp. v. Grant, 228 Ariz. 235, 265 P.3d 417, ¶¶ 8–18 (Ct. App. 2011) (court held trial court erred in entering order precluding hospital's counsel from communicating with hospital employees who had treated plaintiff, other than hospital employees for whom plaintiff was making claim of negligence).

501.650 A physician has the duty to assert the physician-patient privilege, and is required to do so, when served with a subpoena *duces tecum* relating to a patient's medical records, and a hospital has the duty to assert the physician-patient privilege when neither the patient nor the physician is present to assert the privilege.

Linch v. Thomas-Davis Medical Ctr., 186 Ariz. 545, 925 P.2d 686 (Ct. App. 1996) (when served with subpoena, hospital refused to release patient records without court order, and when trial court issued search warrant, hospital requested that trial court conduct in camera review, after which trial court ordered records released "pursuant to the Grand Jury subpoena previously issued"; court held hospital had no further obligation or means to protect records), *review denied as improvidently granted*, 187 Ariz. 501, 930 P.2d 1304 (1997).

501.655 A physician or a hospital has no duty to assert physician-patient privilege when served with a search warrant relating to a patient's medical records.

Linch v. Thomas-Davis Medical Ctr., 186 Ariz. 545, 926 P.2d 686 (Ct. App. 1996) (when served with subpoena, hospital refused to release patient records without court order, and when trial court issued search warrant, hospital requested that trial court conduct in camera review, after which trial court ordered records released "pursuant to the Grand Jury subpoena previously issued"; court held hospital had no further obligation or means to protect records), *review denied as improvidently granted*, 187 Ariz. 501, 930 P.2d 1304 (1997).

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501.660 A defendant who has caused injuries to a victim does not have standing in a criminal case to assert the physician-patient privilege on behalf of the victim.

State v. Miles, 211 Ariz. 475, 123 P.3d 669, ¶¶ 4–18 (Ct. App. 2005) (defendant caused collision that injured victim; defendant moved to preclude introduction of victim's medical records and testimony about seriousness of victim's injuries; state asserted victim had waived privilege by signing release form, but no such form was in record, so court did not find waiver; court held defendant did not have standing to assert victim's physician-patient privilege and held trial court properly admitted testimony and records).

501.665 The state may obtain a victim's medical records, without the victim's permission, when such records are needed for the prosecution of a criminal case.

Benton v. Superior Ct., 182 Ariz. 466, 468, 897 P.2d 1352, 1354 (Ct. App. 1994) (defendant and victim had romantic relationship, but defendant assaulted victim, and state charged defendant with aggravated assault; victim refused to produce medical records, and trial court granted state's request for production; court held Victim's Bill of Rights did not preclude production of records, and held public's interest in protecting victims outweighs privacy interest reflected in physician-patient privilege, thus victim could not claim physician-patient privilege to prevent state from obtaining her medical records).

501.670 Although Arizona courts have recognized a "crime fraud" exception to the attorney-client privilege, they have not recognized such an exception to the physician-patient privilege.

State v. Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶ 11 (Ct. App. 2001) (state charged defendant with fraudulent scheme and artifice as result of filing claims for workers' compensation benefits; court held trial court properly precluded state from questioning doctor who saw defendant for an independent medical examination).

Psychologist-Patient.

501.700 In order for the psychologist-patient privilege to apply, (1) the patient must not consent to the testimony; (2) the witness must be a psychologist; (3) the information must have been imparted to the psychologist while treating the patient; and (4) the information must be necessary to enable the psychologist to act for the treatment of the patient.

Barnes v. Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was a pastor, he treated plaintiff as a psychological therapist, so cleric/priest-penitent privilege did not apply and did not preclude recovery when defendant disclosed communications), *vac'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

501.710 The psychologist-patient privilege applies only to a psychologist with a doctorate degree.

Barnes v. Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was a pastor, he treated plaintiff as psychological therapist, so cleric/priest-penitent privilege did not apply; although defendant was not licensed as counselor and thus privilege would not apply to him, court held his lack of a license did not immunize him from a claim of counseling malpractice based on his disclosure of confidential communications), *vac'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

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501.720 The patient holds the psychologist-patient privilege, thus only the patient may make an objection to a violation of that privilege.

- * *D'Amico v. Structural I Co.*, 229 Ariz. 262, 274 P.3d 532, ¶¶ 6–10 (Ct. App. 2012) (Structural I Co. (SIC) was family-owned company founded and operated by Mary Jo and Doug McLeod (McLeods), who were approaching retirement and seeing counselor Cottor (Cottor); Cottor suggested McLeods hire “bridge-CEO,” and McLeods hired D’Amico for term of 5 years; after about 3 years, things did not go well and SIC discharged D’Amico, who sued SIC; SIC contended trial court should have excluded privileged testimony by Cottor about her personal counseling sessions with McLeods; court held only McLeods held privilege and only they could assert it, and because McLeods were not parties to litigation, SIC had no standing to assert privilege, thus trial court did not err in admitting that testimony).

Reporter-Source.

501.740 Reporter-source privilege belongs to the reporter, and protects persons engaged in newspaper, radio, television, or reportorial work, or connected with or employed by a newspaper, radio, or television station.

Flores v. Cooper Tire & Rubber Co., 218 Ariz. 52, 178 P.3d 1176, ¶¶ 25–26 (Ct. App. 2008) (television station broadcast story based on documents Cooper claimed were subject to confidentiality order, and requested that television station disclose source of documents; television station contended that source of documents was privileged).

501.750 The reporter-source privilege protects a person only from disclosing the source of information procured or obtained for publication or broadcast, and does not protect all the activities of publishers or reporters, nor does it protect any and all information gathered.

State v. Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 138–40 (2004) (because newspaper article did not involve confidential source, trial court erred in finding reporter-source privilege applied, but any error was harmless because trial court could have precluded defendant’s desired cross-examination on relevancy grounds).

Special Education Records.

501.760 The federal statutes use the term “confidential” rather than “privileged,” thus the federal statutes do not create an independent privilege for educational records, but they do limit the instances in which an educational agency may release the records.

Catrone v. Miles, 215 Ariz. 446, 160 P.3d 1204, ¶¶ 16–36 (Ct. App. 2007) (court held trial court properly exercised discretion in reviewing records *in camera* and allowing discovery of only certain documents).

501.765 The statutory privilege for medical records only applies to records maintained for purposes of patient diagnosis or treatment, thus while special education records may contain medical, psychological, or psychiatric information, that information is usually for the purpose of formulating an educational plan, thus the medical records privilege protects only that portion of the record that is for patient diagnosis or treatment, and does not protect the entire record.

Catrone v. Miles, 215 Ariz. 446, 160 P.3d 1204, ¶¶ 10–15 (Ct. App. 2007) (court rejected plaintiff’s contention that medical information contained in son’s special education records protected those records from discovery).

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501.770 In determining whether the statutory interest in the confidentiality of special education records substantially outweighs the interest in their production, the trial court should consider the following factors: (1) the strength of the relationship between the confidential information and the issue in dispute; (2) the harm that may result from the dissemination of the confidential information; (3) whether protective devices limiting the disclosure of the information (such as in-camera inspections and “need-to-know” orders) can significantly reduce the harm from dissemination; (4) whether the information can be obtained from some other source that is either more convenient or less burdensome; (5) whether the party seeking to preclude production is the party that put the need for the documents at issue; and (6) any other factors pertinent to determining whether confidentiality should outweigh production.

Catrone v. Miles, 215 Ariz. 446, 160 P.3d 1204, ¶¶ 2–3, 29–36 (Ct. App. 2007) (plaintiff contended defendants’ malpractice caused younger son’s hearing loss, sensory motor difficulties, neurobehaviorial problems, communication disorders, and impaired cognitive functions; defendants learned that plaintiff’s older son was in special education for learning disabilities, which included speech and comprehension difficulties and cognitive impairment, and thus sought older son’s medical and academic records in support of their theory that younger son’s problems were genetic and not result of medical malpractice; court applied six-part test to facts of case and concluded trial court properly exercised discretion in reviewing records *in camera* and allowing discovery of only certain documents).

Work Product.

501.780 The protection afforded an attorney by Rule 26(b)(3) does not pertain to privileged communications between attorney and client, and instead addresses the discovery of documents and other tangible things otherwise discoverable under Rule 26(b)(1) and prepared in anticipation of litigation or for trial; disclosure of this material is required only on a showing of substantial need and that the party is unable to obtain the substantial equivalent material by other means.

* *Salvation Army v. Bryson*, 229 Ariz. 204, 273 P.3d 656, ¶¶ 10–13 (Ct. App. 2012) (court made statements about work-product privilege, but addressed issue under attorney-client privilege).

Waiver by Statute.

501.815 Because the legislature has created certain privileges by statute, the legislature by statute may limit those privileges.

State ex rel. Romley v. Gaines (Reyes), 205 Ariz. 138, 67 P.3d 734, ¶¶ 10–11 (Ct. App. 2003) (because legislature created physician-patient privilege by state, legislature could limit that privilege in SVP cases under A.R.S. § 36–3702(B)(2)).

Martin v. Reinstein, 195 Ariz. 293, 987 P.2d 779, ¶¶ 95–96 (Ct. App. 1999) (provision in Arizona’s Sexually Violent Persons Act that offender’s psychological reports and tests may be used in SVP proceedings did not violate offender’s doctor-patient privilege).

501.820 A.R.S. § 13–3620(G) provides that all privileges, except the attorney-client privilege, are abrogated in any proceeding involving the abuse of a child, and this includes all forms of abuse of a child, not just involving physical injury to the child.

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 9–14 (Ct. App. 2002) (defendant was charged with DUI and child abuse as result of having children in car; defendant contended § 13–3623(F)(1) limited child abuse to instances when child suffered actual injury; court rejected

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defendant's contention, reasoning that language of § 13-3620(G) suggested broad scope for exception to marital privilege; § 13-3623(B) prohibited conduct when health of child was endangered, thus actual abuse was not required; and § 13-3623(F)(1) expressly limited narrower definition of child abuse to that section).

Waiver by Conduct.

501.835 The party claiming a person has waived a privilege by conduct has the burden of proving that waiver by conduct.

State v. Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶¶ 28-29 (Ct. App. 2001) (state charged defendant with fraudulent scheme and artifice as result of filing claims for workers' compensation benefits; court held trial court implicitly ruled that state had failed to meet burden of showing defendant did not have reasonable, subjective belief that he was seeing doctor for treatment when it precluded state from questioning doctor who saw defendant for an independent medical examination).

501.840 There are three tests used to determine whether a party through litigation has waived a privilege: (1) Under the most restrictive test, the party has either expressly waived the privilege or has impliedly waived it by directly injecting knowledge from a privileged source into the litigation; (2) under the intermediate test, three criteria are present: (a) the asserting party has done an affirmative act, such as filing suit or raising an affirmative defense; (b) through this affirmative act, the asserting party has put the protected information at issue by making it relevant to the case; and (c) application of the privilege would deny the opposing party access to information vital to that party's case; and (3) under the least restrictive test, a party asserts a claim, counter-claim, or affirmative defense that raises a matter to which otherwise privileged material is relevant; Arizona has adopted the intermediate test as set forth by the Restatement: The attorney-client privilege is waived for any relevant communication if the client asserts for any material issue in the proceeding that the client acted upon the advice of a lawyer or that the legal advice was otherwise relevant to the legal significance of the client's conduct.

Twin City Fire Ins. Co. v. Burke (General Star Indem. Co.), 204 Ariz. 251, 63 P.3d 282, ¶¶ 11-23 (2003) (in wrongful death action, General Star (GS) was primary liability insurer with \$1 million coverage, and Twin City (TwC) was excess coverage insurer with \$9 million coverage; during settlement negotiations, plaintiffs offered to settle wrongful death action for less than \$1 million limit, but GS refused; TwC knew of that offer to settle and demanded that GS settle; jurors found in favor of plaintiffs, and trial court entered \$6 million judgment against insureds; insureds subsequently settled with plaintiffs for \$5.4 million; GS paid \$1 million; TwC paid \$4.4 million and brought bad-faith action against GS for the \$4.4 million; GS filed motion asking trial court to order TwC to produce files pertaining to wrongful death action, including any communications between TwC and counsel about wrongful death action; TwC objected on basis that information was either irrelevant or protected by attorney-client privilege; trial court granted GS's motion, finding that information sought "may be evidence that will establish or negate bad faith on the part of General Star"; court noted that, in TwC's bad-faith action against GS, issue was GS's mental state, not TwC's mental state, thus information TwC received from its attorneys was not relevant, and to extent evaluation of case by TwC's attorneys might be similar to evaluation of case by GS's attorneys, that information was not vital because GS could obtain other expert opinion testimony about claim evaluation).

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State Farm v. Lee (Martin), 199 Ariz. 52, 13 P.3d 1169, ¶¶ 10–11 (2000) (plaintiffs brought class action against defendant contending breach of contract, fraud, bad faith, and consumer fraud for refusing to allow policyholders to “stack” uninsured and underinsured motorist provisions of multiple policies; defendant claimed its conduct was reasonable based on knowledge gained from its evaluation of existing case law, applicable statutes, and policies themselves; court held that, because defendant’s knowledge included information gained from consulting with its attorneys, all three parts of the intermediate test were satisfied, thus trial court correctly ordered disclosure of communications defendant had with attorneys).

State v. Thornton, 187 Ariz. 325, 929 P.2d 676 (1996) (by raising insanity defense, defendant waived physician-patient privilege for his mental health records).

Mendoza v. McDonald’s Corp., 222 Ariz. 139, 213 P.3d 288, ¶¶ 35–53 (Ct. App. 2009) (plaintiff sued defendant for breach of implied covenant of good faith and fair dealing in administration of her workers’ compensation claim; jurors awarded plaintiff \$250,000 in compensatory damages, but awarded no punitive damages; court concluded defendant affirmatively asserted its actions in investigating, evaluating, and paying plaintiff’s claim were subjectively reasonable, thus trial court erred in refusing to order disclosure of attorney-client communications and remanded for new trial on issue of punitive damages).

Flores v. Cooper Tire & Rubber Co., 218 Ariz. 52, 178 P.3d 1176, ¶¶ 27–31 (Ct. App. 2008) (television station broadcast story based on documents Cooper claimed were subject to confidentiality order, and requested that television station disclose source of documents; television station sought declaratory judgment action that it had complied with confidentiality order; court held that, by bringing that action, television station did not waive privilege).

Flores v. Cooper Tire & Rubber Co., 218 Ariz. 52, 178 P.3d 1176, ¶¶ 32–35 (Ct. App. 2008) (television station broadcast story based on documents Cooper claimed were subject to confidentiality order, and requested that television station disclose source of documents; television station sought declaratory judgment action that it had complied with confidentiality order; television station disclosed it had obtained documents from whistle-blower; court held that, by disclosing that it had obtained documents from whistle-blower, television station did not waive privilege for name of whistle-blower).

P.M. v. Gould (Moore), 212 Ariz. 541, 136 P.3d 223, ¶¶ 8, 35–36 (Ct. App. 2006) (defendant was convicted of sexual conduct with minor and sexual assault on his daughter; although at first sentencing state never presented any of victim’s records or communications with her counselor, trial court found as aggravating circumstance emotional harm to victim and imposed aggravated sentence; defendant had to be resentenced after *Blakely*; trial court held that, in order for state to prove emotional harm to victim and for defendant to have effective cross-examination at resentencing, victim must disclose records and communications with her counselor, and held that, because it had already found emotional harm as aggravating circumstance at first sentencing, that finding resulted in victim waiving her privilege for any relevant records; court noted that victim is not a party to criminal case and thus does not control conduct that could support finding of waiver, and therefore held that victim had not waived her rights or placed her medical or behavioral health conditions at issue merely because she testified as witness).

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State v. Wilson, 200 Ariz. 390, 26 P.3d 1161, ¶¶ 15–18 (Ct. App. 2001) (state charged defendant with fraudulent scheme and artifice as result of filing claims for workers' compensation benefits; court noted (1) state, not defendant, sought to call doctor, (2) defendant did not threaten third party with physician-patient privilege and then invoke privilege, and (3) defendant did not testify or otherwise disclose substance of communication, and thus concluded defendant had not waived privilege by conduct, thus trial court properly precluded state from questioning doctor who saw defendant for an independent medical examination).

Elia v. Pifer, 194 Ariz. 74, 977 P.2d 796, ¶¶ 37–40 (Ct. App. 1998) (defendant was plaintiff's former attorney in dissolution action; after dissolution, plaintiff filed for bankruptcy; plaintiff sued defendant for legal malpractice, claiming defendant did not have authority to agree to terms of proposed settlement agreement; court held that plaintiff's claim of malpractice placed in issue communications with bankruptcy attorneys because, if plaintiff never told them defendant settled dissolution without his approval, it would give rise to inference that defendant had not committed malpractice, and if plaintiff had told them and they failed to follow his instructions to attack dissolution decree in bankruptcy proceeding, they might be negligent, which would reduce defendant's share of the liability; court rejected plaintiff's contention that his suing former dissolution attorney only waived attorney-client privilege with that attorney, and held instead that, because of the nature of the claim, it also waived attorney-client privilege with bankruptcy attorneys).

501.845 In a case when a litigant claiming the attorney-client privilege relies on and advances as a claim or defense a subjective and allegedly reasonable evaluation of the law, and this evaluation necessarily incorporates what the litigant learned from its attorneys, the communications are discoverable and admissible, but when a litigant claiming the attorney-client privilege defends exclusively on the basis that its actions were objectively reasonable and merely asked its attorneys to evaluate the reasonableness of its conduct under the statutes and case law, the party has not waived the attorney-client privilege because it has not put at issue any advice it received from its attorneys.

State Farm v. Lee (Martin), 199 Ariz. 52, 13 P.3d 1169, ¶¶ 15, 22, 28 (2000) (plaintiffs brought class action against defendant contending breach of contract, fraud, bad faith, and consumer fraud for refusing to allow policyholders to “stack” uninsured and underinsured motorist provisions of multiple policies; defendant claimed its conduct was reasonable based on knowledge gained from its evaluation of existing case law, applicable statutes, and policies themselves; court held that, because defendant's knowledge included information gained from consulting with its attorneys, trial court correctly ordered disclosure of communications defendant had with attorneys).

Mendoza v. McDonald's Corp., 222 Ariz. 139, 213 P.3d 288, ¶¶ 35–53 (Ct. App. 2009) (plaintiff sued defendant for breach of implied covenant of good faith and fair dealing in administration of her workers' compensation claim; jurors awarded plaintiff \$250,000 in compensatory damages, but awarded no punitive damages; court concluded defendant affirmatively asserted its actions in investigating, evaluating, and paying plaintiff's claim were subjectively reasonable, thus trial court erred in refusing to order disclosure of attorney-client communications and remanded for new trial on issue of punitive damages).

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501.850 When a party testifies about otherwise privileged communications, or denies having relevant communications that would otherwise be privileged, the party waives the privilege for those communications, and may be impeached by the other party to those communications.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 34–37 (2001) (defendant testified and denied he had any conversations with his ex-wife about the murder; court held trial court properly allowed ex-wife to testify about conversations she had with defendant about the murder).

501.855 Because (1) Arizona allows full cross-examination of expert witnesses, (2) the rules of civil procedure allow full discovery of expert witnesses, and (3) it is beneficial to have a bright-line for discovery for expert witnesses who are both consulting experts and testifying experts, if a party designates a consulting expert as a testifying expert, the party will waive any work-product privilege for communications with that expert.

Arizona Indep. Redist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 42–50 (Ct. App. 2003) (Arizona Independent Redistricting Commission hired National Demographics Corporation as lead consultant in redistricting process; court held that, because IRC named NDC personnel as testifying experts, IRC waived any legislative privilege for communication with those experts, any materials reviewed by them, and subject of expert's testimony).

501.857 If a party designates a consulting expert as a testifying expert, the party may re-establish the work-product privilege for communications with that expert if the party withdraws that expert as a testifying witness.

Green v. Nygaard (Green), 213 Ariz. 460, 143 P.3d 393, ¶¶ 8–19 (Ct. App. 2006) (wife had listed expert witness as testifying expert witness; at pre-decree hearing addressing parties' possession of liquid assets *pendente lite*, wife had expert witness testify; parties later stipulated to division of assets; wife then withdrew designation of witness as testifying expert; court held that trial court erred in ordering disclosure of expert witness's entire file).

501.870 A person will usually waive the privilege if the person makes the statement when a third person is present on the ground that the person holding the privilege could not have intended to be confidential those communications the person knowingly allowed to be overheard by someone foreign to the confidential relationship, but this general rule does not apply when the third person's presence does not indicate a lack of intent to keep the communication confidential.

State v. Archibeque, 223 Ariz. 231, 221 P.3d 1045, ¶¶ 15–25 (Ct. App. 2009) (defendant and wife were members of Church of Jesus Christ of Latter-day Saints; wife told Church Bishop defendant admitted to her he had inappropriately touched step-daughter; defendant and wife then met with Bishop, and defendant admitted sexually touching step-daughter; because purpose of discussion was both repentance process and spiritual guidance and marital advice, court concluded neither presence of wife during discussions with Bishop nor defendant's statement to wife prior to meeting with Bishop waived privilege).

State ex rel. Thomas v. Schneider (Hanna et al.), 212 Ariz. 292, 130 P.3d 991, ¶ 33 (Ct. App. 2006) (notary and city clerk backdated financial disclosure statements that city council members did not timely file; communications were between city attorney and members of city council and city clerk about these events, made both in private and during executive sessions of the city council; court noted that A.R.S. § 38–431.03(F) provides that no disclosure of information in executive session constitutes waiver on any privilege, including attorney-client privilege).

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State v. Sucharew, 205 Ariz. 16, 66 P.3d 59, ¶¶ 13–16 (Ct. App. 2003) (state alleged defendant and Doyle were racing when defendant's vehicle collided with victim's vehicle, killing victim; to obtain his testimony, state granted immunity to Doyle (a minor); when cross-examining Doyle, defendant sought to question Doyle about conversations Doyle had with his attorney, and state objected on basis of attorney-client privilege, which trial court sustained; defendant contended privilege was waived because Doyle's parents were present when Doyle spoke to attorney; court noted Doyle's parents had hired and paid for the attorney, and that their presence was result of their taking interest and advisory role in their minor son's legal affairs, thus their presence during communications did not indicate lack of intent to keep communication confidential, so there was no waiver of attorney-client privilege).

State v. Foster, 199 Ariz. 39, 13 P.3d 781, ¶¶ 9–16 (Ct. App. 2000) (defendant was suspect in murder investigation, and his parole officer returned him to AzDOC; while there, defendant contacted inmate who was "legal representative" and asked for assistance in preparing for parole violation hearing; after defendant confessed to "legal representative" that he killed victim, "legal representative" then told police of confession; because defendant made statements to "legal representative" while another inmate was present, defendant could not claim conversations were privileged).

501.875 Once a party has waived a privilege at a trial or otherwise, that party may not reassert that privilege.

State v. Harrod, 218 Ariz. 268, 183 P.3d 519, ¶¶ 11–16 (2008) (at trial, defendant testified and denied he had any conversations with his ex-wife about the murder; court held defendant waived marital communication privilege and that trial court properly allowed ex-wife to testify about conversations she had with defendant about the murder; court held this waiver continued through resentencing proceedings and thus trial court properly allowed ex-wife to testify at resentencing).

Comment on Exercise of Privilege.

501.880 A party commits reversible error if it comments on the failure of the other party to call a privileged witness.

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 15–17 (Ct. App. 2002) (during jury voir dire, trial court listed defendant's wife as potential witness; in opening statement, defendant told jurors wife would testify about certain matters; defendant later told trial court he had changed his mind and that he was invoking marital privilege so that wife could not testify; trial court told jurors wife would not be excluded from courtroom because defendant had invoked marital privilege and thus wife would not be witness; after trial court concluded marital privilege did not apply because defendant was charged with child abuse, trial court told jurors wife would testify; because defendant did not object at trial, on appeal court analyzed issue for fundamental error; because jurors acquitted defendant of child abuse, court found defendant was not prejudiced for those counts; for DUI counts, court concluded wife's testimony was favorable, and that favorable testimony dispelled any improper inference jurors might have drawn from defendant's attempt to invoke marital privilege, thus no fundamental error).

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Improper Disclosure of Confidential Communications.

501.900 If a person has received confidential communications from another and discloses them without the other person's consent, the person may be liable for damages.

Barnes v. Outlaw, 188 Ariz. 401, 937 P.2d 323 (Ct. App. 1996) (although defendant was a pastor, he treated plaintiff as a psychological therapist, so cleric/priest-penitent privilege did not apply; court upheld judgment against defendant on plaintiff's claim of counseling malpractice based on defendant's disclosure of confidential communications), *vac'd in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).

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